T Sivam a/l Tharamalingam (as representative/administrator for the estate of Nagamuthu a/l Periasamy, deceased) v Public Bank Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-76–07 OF 2017 (J)
ZULKEFLI PCA, ZAINUN ALI, RAMLY ALI, AZAHAR MOHAMED AND BALIA YUSOF FCJJ
17 MAY 2018

Agency — Liability of principal — Agent's knowledge imputed to principal — Solicitor who acted for fraudster in obtaining title to innocent party's land later acted for bank which gave loan to fraudster — Solicitor prepared loan documentation and created charge over land in bank's favour but did not inform bank that original owner of land claimed he had been duped of land — Whether solicitor's prior knowledge of alleged fraud was imputable to bank — Whether knowledge required bank to have made further enquiries before it granted loan and secured charge — Whether bank careless and negligent in not making enquiries — Whether bank had not acted in good faith in acquiring interest in land via charge — Whether bank's charge defeasible and not protected under proviso to s 340(3) of the National Land Code — Whether agent's knowledge of fraud imputable to his principal except where agent himself was complicit in the fraud

A son ('Nagarajan') of the owner of a piece of land ('the deceased') fraudulently transferred his father's land into his name using the services of a solicitor and then got the solicitor to demand that the deceased hand over vacant possession of the land within a month or face ejectment proceedings. The deceased promptly got his lawyers to notify the solicitor that Nagarajan had fraudulently acquired the land without his knowledge; that a suit would be filed to set aside the transfer and requesting that the status quo of the land be maintained until the suit was disposed of. Despite knowing of the fraud allegation, Nagarajan's solicitor did not disclose it to the respondent bank ('PBB') when he acted for it in preparing the loan documentation and a charge over the land in PBB's favour to secure a loan PBB had granted Nagarajan and another person. Nagarajan's solicitor was the only lawyer who acted for all the parties in the loan transaction. When the deceased, who had already set aside the transfer of the land in Nagarajan's favour some years earlier, came to know about the existence of the charge, he filed another suit, this time against PBB, to declare the charge invalid and to set it aside. PBB argued that its charge was indefeasible under s 340 of the National Land Code ('the NLC') because it was a bona fide subsequent purchaser for value and had no knowledge of the fraud. The appellant, who by then had become the administrator of the deceased's estate,

however, contended that since Nagarajan's solicitor knew about the fraud allegation at the time he was engaged by PBB to handle the loan documentation and charge, that knowledge had to be imputed to PBB at the material time. Accordingly, the appellant said PBB was not a 'purchaser in good faith' who was protected under the proviso to s 340(3) of the NLC and the charge was defeasible and could be set aside. PBB countered by saying that the solicitor's knowledge of the fraud allegation was relevant only to the earlier transaction (the transfer) where he had acted for Nagarajan as his principal and could not be imputed to the bank which had engaged him at a later date for a separate transaction. The High Court held that as PBB was an immediate (and not a subsequent) acquirer of an interest in the land, it was not protected by the proviso to s 340(3) of the NLC and accordingly the charge was invalid for being based on a void (fraudulent) instrument of transfer. The Court of Appeal ('COA') overturned that decision holding that PBB was not an immediate, but a subsequent, purchaser in good faith and for valuable consideration because when it granted the loan, the land had already been transferred to Nagarajan. The COA ruled that PBB's interest in the charge was indefeasible and protected by the proviso to s 340(3) of the NLC. In the instant appeal against the COA's decision, the Federal Court was asked to determine in what circumstances and to what extent a solicitor's knowledge of certain facts could be imputed to his client.

Held, allowing the appeal, setting aside the COA's decision and reinstating the decision of the High Court but on different grounds:

(1) On the facts of the case, the knowledge of the solicitor was regarded and treated by the law as the knowledge of PBB. The bank was thus infected with the knowledge that there was a serious dispute as to the ownership of the land. PBB, accordingly, knew of the allegation that Nagarajan had obtained title to the land by fraud and by reason of that knowledge, PBB's 'good faith' in the entire transaction was very lacking and defeated its defence of being a purchaser in good faith under the proviso to s 340(3) of the NLC. PBB had not acquired the interest in the land in good faith and the charge created in its favour was therefore defeasible (see paras 88 & 91).

(2) In the light of the fraud allegation, there was a real necessity to have conducted further investigative work. The allegation was material enough to arouse suspicion and had a real capacity to affect PBB's interest. Yet, PBB proceeded to disburse the loan to Nagarajan and created the charge on the land without making further inquiries. On the facts, the elements of 'carelessness and negligence' also negated good faith on PBB's part (see paras 89–90).

(3) The solicitor's knowledge of the fraud allegation acquired by him in a previous transaction when he acted for Nagarajan was imputable to the

bank. The solicitor was duty-bound to report to PBB on any encumbrances he was aware of in respect of the loan transaction. He had a duty to investigate and communicate the results to PBB. The bank relied on his opinion and skill to obtain indefeasibility of interest for the charged land. Although the two transactions were separated from each other by a period of about three months, they were immediately consequent on one another and were so closely connected that the first must obviously have still been present in the solicitor's mind. He could not claim to have forgotten the information in question. How he had acquired the knowledge was irrelevant; it was material to the solicitor's duty to PBB. In such circumstances, the solicitor's knowledge of facts he had acquired in the earlier transaction must be imputed to PBB in the course of his acting for the bank in the conveyancing transaction (see paras 85–86).

(4) The law imputed to the principal knowledge of facts which the agent knew except where a prior fraud was committed by the agent himself because in such a case the agent would obviously conceal knowledge of the fraud. Hence, where a solicitor was not complicit in the fraud but had knowledge of the same, that knowledge had to be imputed to his client (see paras 67 & 69).

(5) The High Court was plainly wrong to hold that PBB was an 'immediate purchaser' for the purposes of the proviso to s 340(3) of the NLC (see para 28).

(6) The existence of good faith or otherwise depended on the particular facts of each case; it was a question of fact in each case for the court to determine on the evidence. Good faith did not simply mean absence of fraud, deceit or dishonesty; it also required acting honestly, reasonably or fairly. Knowledge of a dispute as to the ownership of property and knowledge of fraud, for example, could vitiate good faith. The elements of good faith were not closed but depended upon the circumstances in each case (see paras 46 & 50).

[Bahasa Malaysia summary

Seorang anak lelaki ('Nagarajan') pemilik sebidang tanah ('si mati') telah secara fraud memindahhak tanah bapanya kepada namanya menggunakan perkhidmatan peguamcara dan kemudian mengarah peguamcara itu menuntut agar si mati menyerahkan milikan kosong tanah itu dalam tempoh satu bulan atau menghadapi prosiding pengusiran. Si mati dengan segera mengarahkan peguamnya untuk memberitahu peguamcara bahawa Nagarajan telah secara fraud memperoleh tanah itu tanpa pengetahuannya; bahawa guaman akan difailkan untuk mengetepikan pindah milik itu dan memohon agar status quo tanah itu dikekalkan sehingga guaman tersebut diselesaikan. Walaupun mengetahui tentang dakwaan fraud itu, peguamcara Nagarajan

tidak mendedahkannya kepada bank responden ('PBB') apabila dia bertindak untuknya dalam menyediakan dokumen pinjaman dan gadaian ke atas tanah tersebut menyebelahi PBB untuk menjamin pinjaman yang diberikan PBB kepada Nagarajan dan seorang yang lain. Peguamcara Nagarajan hanya seorang peguam yang bertindak untuk semua pihak dalam transaksi pinjaman. Apabila si mati, telahpun mengetepikan pindah milik tanah tersebut menyebelahi Nagarajan beberapa tahuan lebih awal, mengetahui tentang kewujudan gadaian itu, dia telah memfailkan satu lagi guaman, untuk mengisytharkan gadaian itu tidak sah dan untuk diketepikan. PBB berhujah bahawa gadaiannya tidak boleh disangkal di bawah s 340 Kanun Tanah Negara ('KTN') kerana ia adalah pembeli berikutnya yang bona fide untuk nilai dan tidak mengetahui tentang fraud itu. Perayu, yang mana pada masa itu telah menjadi pentadbir harta pusaka si mati, walau bagaimanapun, berhujah bahawa oleh kerana peguamcara Nagarajan mengetahui tentang dakwaan fraud itu pada masa dia dilantik oleh PBB untuk mengendalikan dokumen pinjaman dan gadaian itu, pengetahuan tersebut hendaklah dikaitkan dengan PBB pada masa matan. Sewajarnya, perayu mengatakan PBB bukan 'purchaser in good faith' yang dilindungi di bawah proviso s 340(3) KTN dan gadaian itu boleh disangkal dan boleh diketepikan. PBB membalas dengan mengatakan bahawa pengetahuan peguamcara tentang dakwaan fraud adalah relevan hanya kepada transaksi yang lebih awal itu (pindah milik itu) di mana dia telah bertindak untuk Nagarajan sebagai prinsipalnya dan tidak boleh dikaitkan dengan bank itu yang telah melantiknya pada tarikh kemudiannya untuk transaksi yang berasingan. Mahkamah Tinggi telah memutuskan bahawa oleh kerana PBB adalah pemeroleh serta merta (dan bukan berikutnya) berhubung kepentingan dalam tanah itu, ia tidak dilindungi oleh proviso s 340(3) KTN dan sewajarnya gadian itu adalaah tidak sah kerana berasaskan instrumen yang tidak sah (secara fraud). Mahkamah Rayuan ('MR') telah mengakas keputusan tersebut dengan memutuskan bahawa PBB bukan pembeli yang serta merta, tetapi yang seterusnya, yang berniat baik dan untuk balasan yang bernilai kerana apabila ia memberikan pinjaman itu, tanah tersebut telahpun dipindah milik kepada Nagarajan. MR memutuskan bahawa kepentingan PBB dalam gadaian itu tidak dapat disangkal dan dilindungi oleh proviso s 340(3) KTN. Dalam rayuan ini terhadap keputusan MR, Mahkamah Persekutuan dipohon untuk menentukan dalam keadaan apakah dan setakat mana pengetahuan peguamcara berhubung fakta tertentu boleh dikaitkan dengan anak guamnya.

Diputuskan, membenarkan rayuan, mengetepikan keputusan MR dan mengembalikan keputusan Mahkamah Tinggi tetapi atas alasan berbeza:

(1) Berdasarkan fakta kes, pengetahuan peguamcara dianggap dan diterima oleh undang-undang sebagai pengetahuan PBB. Bank tersebut dengan itu mempunyai pengetahuan bahawa terdapat pertikaian serius berhubung pemilikan tanah tersebut. PBB, sewajarnya, mengetahui tentang dakwaan bahawa Nagarajan telah memperoleh hak milik kepada

tanah tersebut melalui fraud dan oleh sebab pengetahuan tersebut, tiada langsung 'good faith' PBB dalam keseluruhan transaksi itu dan menggagalkan pembelaannya sebagai pembeli berniat baik di bawah proviso kepada s 340(3) KTN. PBB tidak memperoleh kepentingan dalam tanah tersebut dengan niat baik dan gadaian yang dibentuk menyebelahinya oleh itu boleh disangkal (lihat perenggan 88 & 91).

(2) Berdasarkan dakwaan fraud, terdapat keperluan sebenar untuk menjalankan kerja siasatan selanjutnya. Dakwaan itu adalah material sehingga menimbulkan syak wasangka dan mempunyai keupayaan sebenar untuk menjejaskan kepentingan PBB. Namun begitu, PBB meneruskan untuk mengagihkan pinjaman kepada Nagarajan dan membentuk gadaian ke atas tanah tersebut tanpa membuat siasatan selanjutnya. Berdasarkan fakta, elemen-elemen 'carelessness and negligence' juga menidakkan niat baik di pihak PBB (lihat perenggan 89–90).

(3) Pengetahuan peguamcara berhubung dakwaan fraud yang diperoleh olehnya dalam transaksi terdahulu apabila dia bertindak untuk Nagarajan adalah berkaitan kepada bank itu. Peguamcara terikat dengan kewajipan untuk melaporkan kepada PBB berhubung apa-apa sekatan yang disedarinya berkaitan transaksi pinjaman itu. Dia mempunyai kewajipan untuk menyiasat dan menyampaikan laporan-laporan itu kepada PBB. Bank itu bergantung kepada pendapat dan kemahirannya untuk memperoleh kepentingan yang tidak boleh disangkal bagi tanah yang dicagarkan itu. Walaupun dua transaksi telah diasingkan daripada satu sama lain dalam tempoh lebih kurang tiga bulan, ia adalah akibat serta merta antara satu sama lain dan berkait rapat sehinggakan yang pertama semestinya masih jelas dalam fikiran peguamcara. Dia tidak boleh mendakwa telah melupakan maklumat yang dipersoalkan. Bagaimana dia memperoleh pengetahuan itu adalah tidak relevan; ia adalah material kepada kewajipan peguamcara kepada PBB. Dalam keadaan sedemikian, pengetahuan peguamcara tentang fakta yang telah diperolehinya dalam transaksi lebih awal mestilah dikaitkan kepada PBB sepanjang masa dia bertindak untuk bank itu dalam transaksi konveyansing (lihat perenggan 85–86).

(4) Undang-undang mengaitkan pengetahuan utama fakta yang diketahui ejen kecuali di mana fraud terdahulu telah dilakukan oleh ejen itu sendiri kerana dalam kes sedemikian ejen jelas akan mendedahkan pengetahuan fraud itu. Justeru, di mana peguamcara tidak komplisit dalam fraud tetapi mempunyai pengetahuan yang sama, pengetahuan tersebut perlu dikaitkan kepada anakguamnya (lihat perenggan 67 & 69).

(5) Mahkamah Tinggi jelas salah kerana memutuskan bahawa BB adalah 'immediate purchaser' bagi tujuan proviso kepada s 340(3) KTN (lihat perenggan 28).

(6) Kewujudan niat baik atau sebaliknya bergantung kepada fakta tertentu setiap kes; ia adalah persoalan fakta dalam setiap kes untuk ditentukan mahkamah berdasarkan keterangan. Niat baik bukan sahaja bermaksud ketiadaan fraud, penipuan atau ketidakjujuran; ia juga memerlukan tindakan secara jujur, munasabah atau adil. Pengetahuan tentang pertikaian mengenai pemilikan harta dan pengetahuan tentang fraud, misalnya, dapat menjamin niat baik. Elemen-elemen niat baik tidak dinyatakan tetapi bergantung pada keadaan dalam setiap kes (lihat perenggan 46 & 50).]

Notes

For cases on liability of principal in general, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1564–1593.

Cases referred to

Abu Bakar bin Ismail & Anor v Ismail bin Husin & Ors and other appeals [2007] 4 MLJ 489; [2007] 3 CLJ 97, CA (refd)
Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (folld)
Au Meng Nam & Anor v Ung Yak Chew & Ors [2007] 5 MLJ 136, CA (refd)
Bradley v Riches (1878) 9 Ch D 189, Ch D (refd)
Breskvar v Wall (1971) 126 CLR 376, HC (refd)
CIMB Bank Bhd v AmBank (M) Bhd & Ors [2017] 5 MLJ 142; [2017] 9 CLJ 145, FC (refd)
Chin Hein Chong v Tey Sin Sze & Anor [2016] MLJU 1156; [2017] 4 CLJ 348, HC (refd)
Datuk Jagindar Singh & Ors v Tara Rajaratnam [1983] 2 MLJ 196, FC (refd)
Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85, FC (not folld)
El Ajou v Dollar Land Holdings plc and another [1994] 2 All ER 685, CA (refd)
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Frazer v Walker and Others [1967] 1 All ER 649; [1967] 1 AC 569, PC (refd)
Gibbs v Messer [1891] AC 248, PC (refd)
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Hargreaves v Rothwell (1836) 1 Keen 154 (refd)
Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768; [2014] 1 CLJ 987, FC (refd)
Kettlewell v Watson (1882) 21 Ch D 685, Ch D (refd)
Law Society of Singapore v Udeh Kumar s/o Sethuraju [2013] 3 SLR 875 (refd)
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Lee Tee @ Lee Kim Mok & Anor v Seek Lai Neo & Anor [2000] 1 MLJ 466, CA (refd)
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Majlis Peguam Malaysia & Ors v Raja Segaran a/l Krishnan [2005] 1 MLJ 15, CA (refd)

O'Keefe v London and Edinburgh Insurance Co Ltd [1928] NI 85, CA (distd)
Ong Ban Chai & Ors v Seah Siang Mong [1998] 3 MLJ 346, CA (refd)
Overseas Chinese Banking Corporation Ltd v Lee Tan Hwa & Anor (Goh Ah Chwee & Anor Interveners) [1989] 1 MLJ 261, HC (refd)
Pandit Ram Narain v The State of Uttar Pradesh and Ors AIR 1957 SC 18, SC (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465, FC (refd)
Pembangunan Orkid Desa Sdn Bhd v Liputan Simfoni Sdn Bhd [2015] MLJU 998; [2016] 1 CLJ 664, HC (refd)
Puspavathy a/p Thaveethu v Majlis Perbandaran Klang & Ors and other appeals [2008] 6 MLJ 672, CA (refd)
Rolland v Hart (1871) LR 6 Ch App 678 (refd)
Saffron Walden Second Benefit Building Society v Rayner (1880) 14 Ch D 406, CA (distd)
Sargent v ASL Developments Ltd (1974) 131 CLR 634, HC (refd)
Sia Hiong Tee & Ors v Chong Su Kong & Ors [2015] 4 MLJ 188, FC (refd)
Spector v Ageda [1973] Ch 30, Ch D (refd)
State Tailor Sdn Bhd v Nallapan [2005] 2 MLJ 589, CA (refd)
Stuart v Kingston [1923] HCA 17; [1923] 32 CLR 309, HC (refd)
Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113, FC (refd)
Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor [1993] 3 MLJ 633, HC (refd)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1, FC (refd)
Teh Bee v K Maruthamuthu [1977] 2 MLJ 7, FC (refd)
Thong Foo Ching & Ors v Shigenori Ono [1998] 4 MLJ 585, CA (refd)
Waimiha Sawmilling Company v Waione Timber Company, Limited [1926] AC 101, PC (refd)
Yap Kok Ming v Machang Timber Sdn Bhd [1999] MLJU 643, HC (refd)

Legislation referred to

National Land Code ss 5, 92, 98, 340, 340(2), (2)(a), (3), 241(1)

Appeal from: Civil Appeal No J-02 (NCVC)(W)-1729–10 of 2015 (Court of Appeal, Putrajaya)

Gobind Singh Deo (S Prakash and Joanne Chua Tsu Fae with him) (Kamil Hashim Raj & Lim) for the appellant.
Chan Kok Keong (Samuel Tan Lih Yau and Denise Teoh Gaiy Eeng with him) (Shook Lin & Bok) for the respondent.

Azahar Mohamed FCJ (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the Court of Appeal which reversed the decision of the High Court after a full trial of the matter that arose out of a disputed registered land dealing.

[2] The dispute was about the competing claims on a same piece of land between two parties namely, the original registered owner of the land and a chargee bank, a subsequent holder of interest in the land, who were both affected by the fraud of a third party. The subject matter of the dispute between the two parties was whether or not a chargee bank, a subsequent holder of interest, was entitled to raise the shield of indefeasibility under s 340 of the National Land Code ('the NLC').

[3] The appeal originated from an action commenced by the appellant (T Sivam a/l Tharamalingam as the administrator of the estate of the deceased Nagamuthu a/l Periasamy ('deceased')) in the Muar High Court vide Civil Suit No 22NCVC-78–10 of 2013 ('the 2013 Suit'). The appellant was the plaintiff in the High Court. The High Court allowed the appellant's claim against the respondent (Public Bank Bhd, the defendant in the High Court). In allowing the claim, the High Court primarily held that the registered charge over the land in question created in favour of Public Bank Bhd was invalid in law and should be cancelled immediately. The Court of Appeal reversed that decision, which eventually led to the decision being appealed against herein.

[4] We shall refer to the parties in this judgment as they were cited in the High Court.

ESSENTIAL FACTS

[5] The relevant facts are as follows. At all material times, the deceased was the original registered proprietor of a piece of agricultural land held under Hakmilik No HS(M) 3612 Lot No 913, Mukim of Rengam, District of Kluang, Johor ('land').

[6] On or about 16 May 2006, one of the deceased's sons, Nagarajan a/l Nagamuthu ('Nagarajan') fraudulently transferred the land to himself through Presentation No 1639/2006. The solicitor who acted for the deceased and Nagarajan, as a common solicitor, was one Mr P Thirumalai ('solicitor'). On 22 June 2006, the title of the land showed that Nagarajan was the registered proprietor.

A [7] Later, upon Nagarajan's and one Sithra Velusamy's ('Sithra') application, the defendant granted a fixed loan of RM100,000 to Nagarajan and Sithra pursuant to a letter of offer dated 18 October 2006 and facility agreement dated 22 February 2007.

B [8] In the context of the present case, what was far more important, a memorandum of charge over the land was duly registered on 26 February 2007 under Charge Presentation No 520/2007. In this land transaction, the solicitor who acted for Nagarajan also acted for the defendant. The defendant appointed the solicitor for the financing transaction whose duties necessitated C the preparation of the security documentation for the creation of a charge over the land in favour of the defendant. As we shall explain later in the judgment, this is an important point that should be kept in mind.

D [9] Insofar as the evidence goes, it is undisputed that the land was already transferred and registered in Nagarajan's name when the defendant granted the loan to the Nagarajan and Sithra, who then created a charge in favour of the defendant over the land. Thus, from the facts, the defendant was not the immediate acquirer of the interest in the land. The defendant, as the registered E chargee, was the subsequent holder of interest in the land.

THE 2007 SUIT

F [10] More significant still, when the deceased came to know of the fraudulent transfer, the deceased on 29 June 2007 brought a claim against Nagarajan at the Muar High Court vide Civil Suit No 22–77 of 2007 ('the 2007 Suit') to recover the land alleging that the transfer of the land was by fraudulent means.

G [11] After a full trial, the Muar High Court on 18 October 2011 allowed the deceased's claim, and declared that the transfer of the land to Nagarajan was invalid as Nagarajan acquired it through fraudulent means in consideration of alleged love and affection. The High Court made a specific finding that H Nagarajan had fraudulently transferred the land from the deceased. Accordingly, the High Court set aside the impugned transfer.

[12] Nagarajan appealed to the Court of Appeal. On 20 September 2012, the Court of Appeal dismissed his appeal and affirmed the Muar High Court's I decision. This particular action had gone all the way to the Federal Court. Nagarajan filed a notice of motion to the Federal Court for leave to appeal, which was dismissed on 9 July 2013.

THE 2013 SUIT

[13] The dispute in the present case arose when the deceased discovered that Nagarajan had charged the land to the defendant. As a result, on 30 October 2013 the deceased filed the 2013 Suit against the defendant, inter alia, for a declaration that the charge created by Nagarajan in favour of the defendant was defeasible and liable to be set aside.

[14] The plaintiff's claim against the defendant was essentially that the defendant's title as the registered chargee over the land was defeasible and not valid as Nagarajan allegedly acquired the land fraudulently. In this regard, it was alleged that the charge registered in favour of the defendant was defeasible by the element of fraud.

[15] A point to note is that the deceased passed away on 14 February 2014 and as a result, the plaintiff was substituted as the administrator of the estate of the deceased to proceed with the 2013 Suit, which is the subject matter of the present appeal before us.

[16] In its defence, the defendant relied upon the proviso to s 340(3) of the NLC to avail itself of a deferred indefeasibility of title on the charge. As an innocent party, the defendant averred that it had no knowledge of the fraudulent or improper acquisition of the land by Nagarajan from the deceased. It was an important part of the defence's case that the charge was indefeasible as the defendant acquired a subsequent interest in the land as a registered charge in good faith and for valuable consideration. The defendant was protected by the proviso to s 340(3) of the NLC despite Nagarajan acquiring his title by fraudulent means. The defendant contended that its interest as chargee was therefore indefeasible.

[17] On 9 September 2015, the High Court allowed the plaintiff's claim and ordered, inter alia, that:

(a) a declaration that the charge registered on 26 February 2007 under Presentation No 520/2007 is invalid and that the charge be cancelled immediately from the issue document of title of the land;

(b) an order that the memorandum of charge and issue document of title to the land be delivered to the plaintiff;

(c) an order that the transfer of the land under Presentation No 1639/2006 registered on 16 May 2006 be removed from the issue document of title to the land; and

(d) an order that the plaintiff's name be registered as the proprietor of the land.

[18] The High Court made a finding that the defendant was a bona fide acquirer of the interest in the charge and did not have notice of any fraud. Nevertheless, the High Court then decided that the proviso to s 340(3) of the NLC offered no protection to the defendant as the defendant was an immediate acquirer of an interest in the land.

[19] The High Court held that the charge registered on 26 February 2007 by Nagarajan in favour of defendant over the land was defeasible as the land was fraudulently transferred despite the defendant having no knowledge of the fraud.

[20] The High Court then held that the charge was invalid in law as it was based on a void instrument of transfer considering that the transfer of the land from the deceased to Nagarajan was effected by fraudulent means.

[21] The High Court held that the principle of nemo dat quod non habet would defeat the defendant's position as a bona fide subsequent purchaser in land as Nagarajan did not have good title.

DECISION OF THE COURT OF APPEAL

[22] As mentioned earlier, the Court of Appeal allowed the defendant's appeal. In allowing the appeal, the Court of Appeal held that the High Court failed to appreciate that the defendant was a subsequent purchaser in good faith and for valuable consideration and therefore, enjoyed the protection under the proviso to s 340(3) of the NLC.

[23] The court held that the instrument of transfer from the deceased to Nagarajan was signed and validly executed by the deceased, except that it was by fraudulent means. It was undisputed that the land was already transferred and registered in Nagarajan's name when the defendant granted the loan to the Nagarajan and Sithra. Thus, from the facts, the defendant was not the immediate acquirer of the interest in the land. The defendant, as holder of the charge, was the subsequent holder of interest in the land.

[24] In any event, there was no evidence to show that the defendant had knowledge of the dispute between Nagarajan and the deceased at the material time. It was in evidence that the solicitor did not at any point in time inform the defendant of any adverse claim on the land and allegation that Nagarajan acquired the land fraudulently. Though not articulated in so many words, the court held that case law established that one could not impute knowledge of fraud of a solicitor as being knowledge of the client. According to the Court of Appeal, even if the solicitor could be said to have had some knowledge of the allegation of fraud, such knowledge could not be imputed to the defendant.

Thus, the defendant, as the chargee, was a bona fide acquirer of a subsequent interest in the land for valuable consideration and who had no notice of the alleged fraudulent transfer of the land to Nagarajan. The charge was indefeasible and the defendant was entitled to the protection by virtue of the proviso to s 340(3) of the NLC. This was the finding of the Court of Appeal which the plaintiff sought to challenge before us.

THE QUESTIONS OF LAW ON APPEAL TO THE FEDERAL COURT

[25] This court had granted leave to the plaintiff to bring the present appeal on the following two questions of law:

(a) question 1:

Whether knowledge on part of solicitor of claims which amount to encumbrances over a piece of land is imputed back to his client for the purposes of s 340(3) of the NLC? and

(b) question 2:

Whether the principle in *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 that the doctrine of constructive notice does not apply to the Torrens system in that an agent (solicitor)'s knowledge of fraud cannot be imputed to his client, is correct in law.

Whether the principle in *Doshi* is applicable only where there is fraud on the part of the agent in the matter or also in cases whether the said agent was not complicit in the fraud alleged himself.

[26] In the context of the present appeal, the crux of the issue posed in the two questions boils down to the single question of whether the defendant was a purchaser in good faith falling within the proviso to s 340(3) of the NLC. If this is so, then the charge was indefeasible.

[27] The key to the determination of these questions centered on the proper construction of the requirement of 'good faith' in the context of a purchaser falling within the proviso to s 340(3). This is the nub of the matter before us. There is an express requirement of good faith. At its core, is the concept of 'good faith'. To start with, it is necessary for contextual apprehension and appreciation to set out s 340 as a whole, with the necessary emphasis, as follows:

> 340(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

A (2) The title or interest of any such person or body shall not be indefeasible —

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient
B or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

C (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2) —

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in
D the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser

E

[28] A fundamental point to be borne in mind is that the appeal before us was argued on the basis that Nagarajan was the immediate purchaser and that the defendant was the subsequent purchaser. As seen earlier, the legal questions posed for us to answer were premised on this footing. That much was not in
F dispute. What, however, is in serious dispute in the present appeal is whether the defendant was a purchaser in good faith. We are therefore constrained to hold that the High Court was plainly wrong in its finding that the defendant was an immediate purchaser.

G MEANING OF 'PURCHASER'

[29] The first thing to be remembered is that the term 'purchaser' in the proviso to s 340(3) is not limited to those who acquire the land but extends to those acquiring an interest in the land, such as a chargee bank. The term
H 'interest' includes a charge that is a registered interest affecting land (ss 92 and 98 of the NLC). As defined in s 5 of the NLC, 'purchaser' means a person or body who in good faith and for valuable consideration acquires title to, or *any interest*, in the land. Recently, in *CIMB Bank Bhd v AmBank (M) Bhd & Ors* [2017] 5 MLJ 142; [2017] 9 CLJ 145 Raus Sharif Chief Justice in delivering
I the judgment of the Federal Court explained that a chargee comes within the meaning of 'purchaser' under the proviso of s 340(3):

> Section 340 of the NLC referred to indefeasibility of title or interest. Section 340(1) of the NLC itself provides a clear understanding that interest means lease, charge or easement. In fact, the Privy Council in *T Damodaran v Choe Kuan Him* [1979] 2

MLJ 267b had occasion to consider the scope and meaning of 'interest' under the NLC. Lord Diplock who delivered the judgment of the court said:

> interest in land, short of proprietorship, which are capable of being registered are leases, charges and easements.

Similarly, this court in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1 had described the legal position of a chargee as a holder of interest in land. Arifin Zakaria CJ (Malaya) (as he then was) held:

> However, we are of the opinion that the appellant bank (which is a chargee), being the holder of subsequent interest in the Land is protected by the proviso to s 340(3) of the NLC.

The above view of Arifin Zakaria CJ (Malaya) (as he then was) is consistent with the definition of 'purchaser' in s 5 of the NLC as:

> a person or body who in good faith and for valuable consideration acquires title to, or any interest in land.

Clearly, the definition of purchaser in s 5 is not limited to the purchaser who acquires the title to land but includes those who has acquired interest in land.

[30] The undisputed evidence was that Nagarajan transferred the land to himself. Subsequently the defendant granted a fixed loan of RM100,000. As security for the loan, a memorandum of charge was duly registered in favour of the defendant. Section 241(1) of the NLC allows a charge to be created over any alienated land to secure the repayment of any debt. Every charge created under the NLC shall take effect upon registration. Therefore, it cannot be disputed that the defendant fell within the definition of 'purchaser' in the proviso to s 340(3). The defendant was therefore a subsequent purchaser under the proviso.

DEFERRED INDEFEASIBILITY

[31] What then is the legal effect of the charge registered in favour of the defendant? As held by this court in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1, the proviso to s 340(3) provided for deferred indefeasibility and not immediate indefeasibility. The authority established the principle that a chargee bank that was subsequent holder of interest *who acquired the interest in good faith* could avail itself of the protection under the proviso of s 340(3). The chargee bank that had disbursed a loan based on the title as collateral obtained *indefeasibility* of the registered charge.

[32] The concept of indefeasibility of title is central to our Torrens system of registration of title, which provides for the registration of all titles and interests. Under it, a title is made conclusive on registration, subject however to statutory exceptions, so that the state guarantees that the title is unimpeachable (see *The Centenary of the Torrens System in Malaysia*, edited by Tan Sri Datuk Professor

Ahmad Ibrahim and Judith Sihombing, at p 1). The cardinal principle is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor such person upon the registration of the title under which he takes from the registered proprietor has an indefeasible title against the entire world (see *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7 and *Fels v Knowles* (1906) 26 NZLR 604). The concept of indefeasibility is, however, not defined in the NLC. It is worth quoting the terms in which Lord Wilberforce explained the concept in *Frazer v Walker and Others* [1967] 1 All ER 649; [1967] 1 AC 569, a Privy Council case on appeal from New Zealand:

> The expression ('indefeasibility of title and interests') ... is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which ... a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever: ... there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.

[33] In *Gibbs v Messer* [1891] AC 248, Lord Watson in delivering the judgment of the Privy Council explained the object of deferred indefeasibility as follows:

> The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.

[34] As was pointed out in *Fraser v Walker*, a defeasible title can provide a good root for an indefeasible title once the bona fide purchaser acquires a registered interest and the person who lost his title by fraud is only relegated to a claim in personam against the wrongdoer for damages. In *Breskvar v Wall* (1971) 126 CLR 376 which was a decision of the High Court of Australia, a transfer which was void was nonetheless registered and it was held that upon registration of the transfer the title passed and was vested in the transferee and a subsequent purchaser from him obtained a good title.

[35] The position of a purchaser in good faith was clarified in *Puspavathy a/p Thaveethu v Majlis Perbandaran Klang & Ors and other appeals* [2008] 6 MLJ 672 by Richard Malanjum JCA (now CJ (Sabah and Sarawak)) as follows:

> The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the

application of the substantive provision of sub-s (3). For this category of registered proprietors, they obtained immediate indefeasibility notwithstanding that they acquired their titles under a forged document even if the instrument of transfer was forged, the respondent nevertheless obtained an indefeasible title to the said land. Thus, being a purchaser in good faith and for valuable consideration having paid within the stipulated time the balance of the purchase price arising from the public auction sale, the second intervener had acquired an indefeasible title or interest to the said land upon being registered as the registered proprietor.

[36] In *Sia Hiong Tee & Ors v Chong Su Kong & Ors* [2015] 4 MLJ 188, the Federal Court reiterated the concept of deferred indefeasibility as embodied in s 340(3) of the NLC as follows:

In the circumstances where the title or interest is subsequently transferred, s 340(3) provides that the subsequent proprietor or transferee will similarly obtained a defeasible title or interest. However, where the subsequent proprietor or transferee acts in good faith and gives valuable consideration for the title or interest in question, the proviso to s 340(3) confers protection on such a subsequent proprietor or transferee such that his title or interest will be indefeasible. In effect, s 340 introduces what is called the concept of deferred indefeasibility (*Tan Ying Hong v Tan Sian San & Ors*).

[37] The position of a purchaser in good faith was further explained by this court in *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768; [2014] 1 CLJ 987 where Jeffrey Tan FCJ said:

If the title or interest is registered in the name of an immediate purchaser, the bona fides of the immediate purchaser will not offer a shield of indefeasibility. The title or interest of an immediate purchaser is still liable to be set aside if any of the vitiating elements as set out in s 340(2) has been made out. If the title or interest is registered in the name of a subsequent purchaser, then the vitiating elements in 340(2) would not affect the title or interest of a bona fide subsequent purchaser. The title or interest of a subsequent purchaser is only liable to be set aside if the subsequent purchaser is not a bona fide subsequent purchaser. The title or interest acquired by a subsequent purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a subsequent purchaser, is indefeasible.

[38] A subsequent purchaser in good faith is therefore entitled to raise the shield of indefeasibility. In other words, a registered interest of a subsequent purchaser can only be liable to be set aside if the interest is acquired not in good faith. To be more specific, a subsequent purchaser in good faith and for valuable consideration enjoys immunity from adverse claim to his title. For that reason, as between the competing claims of the original owner and the subsequent purchaser in good faith and for valuable consideration, the latter would be entitled to ownership of the subject land. Indefeasibility is conferred on the

A current registered proprietor, and not a former registered proprietor. This is a statutory protection accorded to a subsequent acquirer of interest.

[39] Reverting to the present case, on the issue of whether the defendant was a subsequent holder of interest in good faith, what had become the bone of contention between the parties was the question of attribution of the knowledge of the solicitor to the defendant. In the first place, the proof that one is a purchaser in good faith lies on the person asserting it (see *Abu Bakar bin Ismail & Anor v Ismail bin Husin & Ors and other appeals* [2007] 4 MLJ 489; [2007] 3 CLJ 97). The contending views of parties may be summarised as follows.

[40] Learned counsel for the plaintiff submitted that the defendant was not a registered chargee in good faith on account of the defendant's solicitor having full knowledge of the existence of the adverse claim over the land in question and the allegation that Nagarajan acquired the land fraudulently from the deceased. It had been argued with some refinement that the knowledge of the solicitor could be implied or imputed to the defendant. Hence, he argued, the defendant was not entitled to the defence under the proviso to s 340(3) for the reason that there was a lack of good faith on the part of the defendant.

[41] In resisting the appeal, the position taken by the defendant was somewhat quite straightforward. The defendant's contention was simply this. The defendant's charge was indefeasible as the defendant was a subsequent holder of an interest in the land as a registered chargee in good faith and for valuable consideration. Hence, the proviso to s 340(3) of the NLC was applicable to the defendant despite the transfer to Nagarajan had been obtained by fraudulent means. The defendant maintained all along that it had no knowledge of the adverse claim on the land. That being so, learned counsel submitted that the finding by the High Court which was upheld by the Court of Appeal that the defendant was a bona fide purchaser rendered the leave questions academic, redundant, and incapable of reversing the decision of the Court of Appeal. According to learned counsel, there was in effect no question of law to be answered.

[42] As to the point raised by learned counsel for the defendant that the High Court made a finding that the defendant was a bona fide purchaser, after reading the entire judgment of the High Court we found that in point of fact the High Court never dealt with the said issue in its judgment. The relevant passage of the judgment of the High Court thus reads:

> Oleh itu proviso di bawah s 340 Kanun Tanah Negara 1965 tidak terpakai kepada defendan. Walaupun defendan telah membuktikan bahawa carian telah dibuat terhadap hakmilik hartanah bagi membuktikan bahawa ia adalah pembeli 'bona fide' dan telah membuktikan tidak ada notis diserahkan mengenai kewujudan frod

dalam pemilikan hartanah oleh Nagarajah a/l Nagamuthu, defendan masih tidak boleh menggunapakai proviso di bawah s 340 Kanun Tanah Negara 1965 memandangkan gadaian tersebut berdasarkan instrument yang tidak sah dan dengan itu perlu diketepikan ...

[43] It is apparent from above that the High Court was merely drawing an analogy that the proviso to s 340(3) did not apply in favour of the defendant even if the defendant manages and/or able to prove that it was a bona fide purchaser.

GOOD FAITH

[44] The rival contentions of the parties first bring into sharp focus the meaning of 'good faith' within the context of the proviso to s 340(3) of the NLC. As we have seen earlier, the meaning of 'good faith' is a matter of importance in this case. What does the term mean? 'Good faith' is a weighty phrase. It implies, according to *Concise Oxford English Dictionary* (11th Ed) honesty or sincerity of intention. According to the authors of *NS Bindra's Interpretation of Statutes* (10th Ed) p 1636, 'good faith' includes due inquiry and implies not only an upright mental attitude, and clear conscience of a person, but also the doing of an act, showing that ordinary prudence has been exercised according to the standards of a reasonable person. According to the authors, 'good faith' contemplates an honest effort to ascertain the facts upon which exercise of the power must rest; it must, therefore, be summed up as 'an honest determination from ascertained facts'. The authors stated that 'good faith' precludes pretence or deceit, and also negligence and recklessness. The authors further said although the phrase may vary in the context of different statutes, subjects and situations, honest intent free from taint or fraud, or fraudulent design, is a constant element of its connotation.

[45] As a general statement of a broad legal proposition, the meaning of words and expressions used in an Act must take their colour from the context in which they appear (per SK Das J in *Pandit Ram Narain v The State of Uttar Pradesh and Ors* AIR 1957 SC 18 quoted with approval by our Federal Court in *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113). The meaning and scope of the phrase is, therefore, to be considered in the light of the scheme and purpose of the section in which the phrase occurs. In this regard, security of title by registration lies at the very heart of our country's system of land ownership.

[46] In our opinion, the existence of good faith or otherwise would depend on the particular facts of each case; it is a question of fact in each case for the court to determine on the evidence. The overriding consideration is 'the particular circumstances of each case' (see *Pekan Nenas Industries Sdn Bhd v*

Chang Ching Chuen & Ors [1998] 1 MLJ 465 and *State Tailor Sdn Bhd v Nallapan* [2005] 2 MLJ 589). This was shown in a number of cases by which justice was done in a range of factual circumstances. We need not go through all the cases here. We would only draw attention to two decisions of our courts. These two cases illustrate this point very well.

[47] First, is the case of *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196. In that case, in the context of the person who was applying to set aside a registered title or interest that was defeasible by virtue of s 340(2) and which was now in the hands of a subsequent purchaser, Lee Hun Hoe CJ (Borneo) in delivering the judgment of the Federal Court said:

> In order to maintain any sort of claim against Arul the respondent would first have to succeed against Suppiah and impeach his title. Under the National Land Code in order to succeed against Arul, the respondent must prove against him that at or prior to the time he obtained registration and title to the property, he was either fraudulent, which means that he was a party to the fraud, or had knowledge of the fraud.

[48] Therefore a purchaser who is not guilty of any fraud but who has knowledge that his predecessor's title or interest is tainted with fraud is not entitled to the benefit of the proviso under s 340(3). In the circumstance of that case, it was held that mere knowledge of the fraud would suffice to negate good faith.

[49] The second case is *Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136 where in holding that a purchaser in good faith did not include a purchaser who was careless or who had been negligent, Raus Sharif JCA (as His Lordship then was) in discussing the element of good faith explained:

> Further, had the evidence adduced in this case been properly considered and assessed by the learned trial judge, a reasonable inference would be that the first defendant knew at the time he bought the said land, the purchase price was below the market value. But he wanted to take advantage of the low price. He did a fast track to complete the purchase. In doing so he disregarded his obligations to investigate the alleged proprietors and the genuineness of the documents. My respectful view is that a purchaser in good faith does not include a purchaser who is careless or who had been negligent. In *Oliver v Hinton* [1899] Ch D 264 Lindley MR said:
>
> > To allow a purchaser who acts with such gross carelessness to deprive a prior innocent mortgagee of her priority would be the greatest injustice.
>
> So too here. The first defendant is under the obligation to investigate properly all matters relating to the sale of the said land and not to just blindly accept what was claimed by the 'vendors' as correct and genuine. When he failed to take the ordinary precautions which ought to be taken in such a matter he is not entitled to the protection of the court.

[50] The principle underlying the above cases is that the law recognises and enforces an overriding rule that in making and carrying out conveyancing transaction that commonly deals with a number of transactions and dealings to transfer real property, parties should act in good faith. Good faith, therefore, does not simply mean absence of fraud, deceit or dishonesty; it also requires acting honestly, reasonably or fairly (see *Stuart v Kingston* [1923] HCA 17; [1923] 32 CLR 309 and *Pekan Nenas Industries Sdn Bhd*). The elements of good faith are not closed; it must in all cases depend upon the circumstances. It is not enough for a purchaser to merely show absence of fraud, deceit or dishonesty; knowledge of a dispute as to the ownership of property and knowledge of fraud allegation, for example, could vitiate good faith.

[51] It is necessary to point out that the concept of purchaser in good faith under the proviso to s 340(3) is not the same to the assessment of establishing fraud under s 340(2)(a). In *Ong Ban Chai & Ors v Seah Siang Mong* [1998] 3 MLJ 346 the Court of Appeal held that good faith under the provisions of s 340(3) meant the absence of fraud, deceit or dishonesty. In holding that mere knowledge of an adverse claim did not vitiate good faith, the Court of Appeal relied on *Pekan Nenas Industries Sdn Bhd*. With respect, the Court of Appeal in *Ong Ban Chai v Seah Siang Mong* failed to appreciate that in *Pekan Nenas Industries Sdn Bhd* the Federal Court was not dealing with s 340(3) of the NLC. The Federal Court did not deal with the issue of 'good faith' under the proviso to s 340(3). When the Federal Court referred to the case of *Waimiha Sawmilling Company v Waione Timber Company, Limited* [1926] AC 101 it was in the context of dealing with the issue of 'fraud' under s 340(2)(a) of the NLC, and not the meaning of 'good faith' under the proviso to s 340(3). To this extent, in our opinion, the Court of Appeal in *Ong Ban Chai v Seah Siang Mong* misapprehended the terms of the judgment of the Federal Court in *Pekan Nenas Industries Sdn Bhd* in that, as held by the High Court in *Pembangunan Orkid Desa Sdn Bhd v Liputan Simfoni Sdn Bhd* [2015] MLJU 998; [2016] 1 CLJ 664 and the Court of Appeal in *Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd* [2018] 3 MLJ 386; [2018] 1 CLJ 61, it had erroneously conflated the concepts of 'fraud' under s 340(2)(a) and 'good faith' under the proviso to s 340(3).

[52] This then brings us back to the present case. In addressing the leave questions, the important points that require to be kept in mind that cannot be overlooked, are first, the solicitor acting for the defendant was also the solicitor who acted for Nagarajan, and secondly, no allegations of fraud were made personally against the solicitor.

[53] As seen earlier, the land was fraudulently transferred from the deceased to Nagarajan on 16 May 2006. On 15 July 2006 the deceased lodged a police report stating that Nagarajan obtained title to the land by fraud. Next, on

18 July 2006, the solicitor acting for Nagarajan sent a notice to the deceased demanding delivery of vacant possession of the land. The material part of the notice reads:

> We are the Solicitors for Mr Nagarajan A/L Nagamuthu of No 29, Jalan Sahabat, Taman Emas, 86000 Kluang, Johor with instruction to act herein.
>
> We are instructed that our client is the registered owner of 3.7636 hectares of the property held under HS(M) 3612 PT LOT 913, Mukim Rengam, Johor.
>
> Weare informed that you or your agent or servants have been in occupation of the said property and working harvesting the oil palm fruits for your own benefits.

The notice went on:

> Our client instructs that he intends to clear the said land for the purpose of utilizing the same for the operation of his own business.
>
> Therefore, our instruction are to give you NOTICE TO QUIT and deliver up vacant possession of the said land within one (1) month of date hereof.
>
> TAKE NOTICE that unless you vacate the said land within one (1) month from the date hereof, we have further instruction to institute ejectment proceeding against you or your agent or servants for which you will be liable for all legal cost incurred therefrom.

[54] On 19 July 2006 the deceased affirmed a statutory declaration stating that Nagarajan obtained the title to the land by fraud. Then, Messrs Ramesh Vassn & Co acting for the deceased sent a letter dated 25 July 2006 to the solicitor indicating that there was a dispute as to the ownership of the land and further alleging that Nagarajan obtained title to the land by fraud. The contents of the letter are so striking that we think it right to reproduce it in extenso, with the necessary emphasis:

> REF: NOTICE OF DEMAND — TO GIVE VACANT POSSESION OF LAND HELD UNDER HS(M) 882 PT LOT 913) NOW HS(M) 3612 LOT 913 MUKIM RENGAM
>
> We refer to the above matter wherein we act for Mr Tharmalinggan a/l Nagamuthu, Amayappan a/l Nagamuthu, and Chinamuthu a/l Nagamuthu who has handed over your letter of demand dated 18.7.2006 with instructions to reply thereto.
>
> We understand that your good office has also served similar notices to the other lawful children apart from the above named. Please forward copies of all the notices for our reference and action. We confirm that we are acting for each of the lawful children of Nagamuthu a/l Periasamy.
>
> Having stated the above, we hereby state our client's contention:
>
> 1. *In regards to your client's allegation that he is the lawful owner of the said property, our clients contends that the transfer of the said property from Nagamuthu a/I Periasamy to your client was conducted fraudulently and as such we have been instructed to apply to the High Court to set aside the registration of the transfer. We shall be making the Land Office as a party to the*

suit. In light of the above, kindly confirm as to whether your good office has instructions to accept service of process on behalf of your client.

2. In regards to your client's allegation that he intends to clear the said land for his own business, is strongly objected to by our clients based on the contention as mentioned above;

3. In reference to your client giving a notice to quit and to deliver vacant possession, we have been instructed to oppose any suit that maybe brought by your client to the effect.

4. In the event you have instructions to proceed further, we have instructions to accept service of process for our clients.

We believe that since the ownership of the said property is in contention despite your client being the registered owner as mentioned in your letter, we would insist that the current status quo be maintained until the disposal of the case. In any event, if your good office is not amenable to the above then we shall obtain a court order to the said effect.

Please be informed that we have forwarded a letter to your good office in respect of the said property in question and please consider as to whether there would be a conflict of interest on your good office part to act for your client.

[55] On the above review of the letters we have no doubt that a serious dispute thereof had arisen at the material time between the deceased and Nagarajan on the ownership of the land. From this letter, it is beyond doubt that the solicitor had explicit knowledge of the existence of an adverse or rival claim on the land, and more importantly of the allegation that 'the transfer of the said property from Nagamuthu a/l Periasamy to your client was conducted fraudulently'. This is an important point to remember. The deceased's solicitor had demanded for 'status quo' to be maintained of the land pending the disposal of an impending court action. One could see that at the material time, the solicitor was actively involved in the dispute as to the ownership of the land between the deceased and Nagarajan.

[56] It was against the above background that the solicitor was appointed as the defendant's loan documentation solicitor in respect of the loan that was granted to Nagarajan and Sithra. Clearly, there was a duty on the solicitor to communicate that knowledge of facts to the defendant. The information was material because it affected the defendant's interest.

[57] Nonetheless, despitehaving knowledge of the existence of a dispute as to the ownership of the land, the solicitor prepared and attested the facilities agreement dated 22 February 2007 between the defendant and Nagarajan as a common solicitor. By letter dated 26 February 2007, the solicitor advised the

defendant to release the loan of RM100,000 to Nagarajan. The solicitor subsequently proceeded to register the said charge on 26 February 2007 in favour of the defendant.

[58] The central question that we must then ask here is to what extent would the solicitor's knowledge be imputed to the defendant? This case turned principally upon this question. It is to this important question we now turn.

WHETHER KNOWLEDGE OF THE SOLICITOR SHOULD BE IMPUTED TO THE CHARGEE BANK?

[59] To answer this key question, we have to apply the general law of principal and agent to the actual facts of the present case; it is essentially a question of agency law. As stated by *Bowstead & Reynolds On Agency* (20th Ed) at p 1, agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent.

[60] One of the legal consequences that follow from this fiduciary relationship is that as the agent is an intermediary, the knowledge of an agent can and must sometimes be imputed to the principle. This is a notice through an agent. The concept of imputed knowledge need to be kept separate from the concept of constructive knowledge. Imputed knowledge, where it operates, deems the principal to have the actual knowledge, which the agent has (see *Bowstead & Reynolds On Agency*, p 543). Constructive notice is 'a kind of notice which the courts have inferred against a person from his willfully abstaining from making inquiry or inspecting documents' (per Fry J in *Kettlewell v Watson* (1882) 21 Ch D 685). The law will not allow a person to deny knowledge of facts that his agent knew. As explained by the authors of *Agency Law in Commercial Practice* (2016 Ed) at p 202: the process of imputation treats knowledge held by the agent as the knowledge of his or her principal. It operates where knowledge is relevant to the legal relationship between two persons, but is held only by an agent. Since it is the duty of the agent to convey such facts to the principal, the law presumes the agent has done so without placing upon any one the onerous undertaking of actually establishing it.

[61] It is irrefutable that the relationship between the defendant and the solicitor was that of a principal and agent (see *Cordery's Law Relating To Solicitors* (5th Ed) p 144). The solicitor was an agent of the defendant. If one looks at the matter as a question of principle, it is well settled law as held by the Federal Court in *Doshi v Yeoh Tiong Lay* that the knowledge of a solicitor is

regarded by law as the knowledge of the client, so that it is not open to the client to say that the solicitor did not disclose the true facts to him. The High Court of Australia in *Stuart v Kingston* [1923] HCA 17; [1923] 32 CLR 309 held that the knowledge of the solicitor is to be treated as knowledge of his client. In *Bradley v Riches* (1878) 9 Ch D 189, in explaining the rule that the knowledge of the solicitor is the imputed knowledge of the client, Fry J said:

> If the circumstances of the case are such as in the ordinary course of business between solicitor and client they are, then the solicitor must be assumed to have communicated the fact to his client, and the knowledge of the agent is, to use the language of Lord Chelmsford in *Espin v Pemberton*, the imputed knowledge of the client. It appears to me to be clear that that presumption or imputation is a thing which the client cannot be allowed to rebut.

[62] In *Lee Tee @ Lee Kim Mok & Anor v Seek Lai Neo & Anor* [2000] 1 MLJ 466, the solicitor who was acting for the second and third defendants at the time when the agreement was prepared admitted that he knew there was in existence a sale and purchase agreement between the first defendant and the plaintiffs in respect of the same property. In holding that the knowledge of a solicitor is regarded by law as the knowledge of the client, the Court of Appeal held:

> In the present appeal the second and third defendants pleaded that they were bona fide purchasers without notice and thus protected by s 340 of the National Land Code. The learned judge dealt with this point based on the evidence adduced before him. The learned judge in his judgment stated that the solicitors who was acting for the second and third defendants at the time when the second agreement was prepared, Mr Lim Seng Bok ('DW2), admitted that he knew there was in existence a sale and purchase agreement between the first defendant and the plaintiffs in respect of the same property. The learned judge went on to say that by reason of the decision of *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors* [1995] 2 MLJ 770, it is settled law that the knowledge of a solicitor is regarded by law as the knowledge of the client except where the solicitor acted fraudulently. The learned judge found that since the solicitor had knowledge of the first agreement, the second and third defendants were deemed to have knowledge of the existence of the first agreement. It is up to the parties then to make the necessary search and enquiries that the first agreement had been effectively terminated. Otherwise, the learned judge was of the view that the parties were not protected by the doctrine of bona fide purchasers. For that reason the learned judge found that the second and third defendants were not bona fide purchasers without notice. Though the decision of *Aik Ming* had been reversed by the Federal Court, the principle referred to by the learned judge was affirmed.

[63] In *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639 the Court of Appeal ruled:

A The second proposition which I accept as well settled is that the knowledge of a solicitor is regarded by the law as the knowledge of the client.

[64] The application of the principle can be seen in *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633, *Thong Foo Ching & Ors v Shigenori Ono* [1998] 4 MLJ 585, *Overseas Chinese Banking Corporation Ltd v Lee Tan Hwa & Anor (Goh Ah Chwee & Anor Interveners)* [1989] 1 MLJ 261, *Majlis Peguam Malaysia & Ors v Raja Segaran a/l Krishnan* [2005] 1 MLJ 15 and *Yap Kok Ming v Machang Timber Sdn Bhd* [1999] MLJU 643.

[65] There is one qualification to be made though concerning the case of *Doshi v Yeoh Tiong Lay*. It is necessary to make the point that even though the Federal Court had stated the general principle that the knowledge of a solicitor was regarded by law as the knowledge of the client, it went a step further to state an exception to this rule in cases of fraud, in the following terms:

> There is, however, an important exception to the above rule in cases of fraud, which is stated in *Halsbury's Laws of England* (3rd Ed, Vol 14) para 1019 at p 543 as follows:
>
> > Under the head of actual notice is included notice to an agent employed in the transaction. The notice is imputed to the principal, and it affects him whether communicated to him or not; *but an exception is admitted where there has been fraud on the part of the agent in the matter.* Although actual communication to the principal is not required, yet fraud excludes in practice all probability of communication, and hence the knowledge of the fraudulent agent is not imputed to the principal.

[66] Having quoted the exception above, the Federal Court then went on to state, with the necessary emphasis, as follows:

> *It is thus clear that his solicitor's knowledge of fraud, if any, cannot be imputed to the respondent*. I must therefore reject the appellant's contention that if the respondent had notice by his agent of the previous transactions, then his entering into an agreement to purchase the premises was tantamount to fraud.

[67] Was the Federal Court correct in stating, 'It is thus clear that his solicitor's knowledge of fraud, if any, cannot be imputed to the respondent? Before us, learned counsel for the plaintiff brought to our attention that the exception stated by *Halsbury's Laws of England* that '… an exception is admitted where there has been fraud on the part of the agent in the matter' is quite different from the statement of the court in *Doshi v Yeoh Tiong Lay* that 'it is thus clear that his solicitor's knowledge of fraud if any, cannot be imputed to the respondent'. It appears that what was said by the Federal Court in *Doshi v Yeoh Tiong Lay* implied that the solicitor's knowledge of fraud cannot be imputed to the client generally, regardless of whether the solicitor is complicit in the said fraud or not. With respect, we do not agree. We accept that like all

general rules there are exceptions. In our opinion, an exception to the principle that the knowledge of a solicitor is the knowledge of the client is only admitted where the agent (or solicitor) is complicit in the said fraud. The law impute to the principle knowledge of facts which the agent knows except where a prior fraud committed by the agent which makes it certain the agent would conceal the knowledge.

[68] In this we agree with the Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* where it was held:

> The second proposition which I accept as well settled is that the knowledge of a solicitor is regarded by the law as the knowledge of the client. The only exception to this is where the solicitor acts fraudulently vis-à-vis his client. I cite once again from *Doshi* (at p 88):
>
> ...
>
> In *Bradley v Riches* (1878) 9 Ch D 189 it was held that the presumption that a solicitor has communicated to his client facts which he ought to have made known cannot be rebutted by proof that it was the solicitor's interest to conceal the facts.
>
> There is, however, an important exception to the above rule in cases of fraud, which is stated in 14 *Halsbury's Laws* (3rd Ed) para 1019 (at p 543) as follows:
>
> > Under the head of actual notice is included notice to an agent employed in the transaction. The notice is imputed to the principal, and it affects him whether communicated to him or not; but an exception is admitted where there has been fraud on the part of the agent in the matter. Although actual communication to the principal is not required, yet fraud excludes in practice all probability of communication, and hence the knowledge of the fraudulent agent is not imputed to the principal.
>
> *It is thus clear that his solicitor's knowledge of fraud, if any, cannot be imputed to the respondent. I must therefore reject the appellant's contention that if the respondent had notice by his agent of the previous transactions, then his entering into an agreement to purchase the premises was tantamount to fraud.* (Emphasis added.)
>
> There is little doubt that the words in the judgment of Gill FJ upon which I have placed emphasis were expressed in clear misunderstanding of the passage from Halsbury which was cited by his Lordship. Encik Das said that whatever Halsbury may say, the Federal Court had established an independent principle. I regret that I am unable to agree. The words. 'It is thus clear' with which the proposition begins is clear indication that that proposition rests, not upon some independent theory but upon the passage from Halsbury that precedes it.

[69] The last passage from the judgment *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* deserves particular consideration; we are in full agreement that the court in *Doshi v Yeoh Tiong Lay* misapprehended the terms of the passage from *Halsbury* which was cited by the court. Undeniably, the passage from *Halsbury* did not support the proposition that the solicitor's knowledge of fraud cannot be imputed to the client

generally, regardless of whether the solicitor is complicit in the said fraud or not. In our judgment, where the solicitor was not complicit in the fraud but had knowledge of the same, that knowledge must be imputed to the defendant.

[70] The authors of *Agency Law in Commercial Practice*, at p 205 explained the fraud exception as follows:

> Explanations of what has been referred to as the 'fraud exception' (Rule (4) above) seem to rest on ideas of presumed communication, or rather the probable lack of communication in situations where the agent is defrauding his or her principal. It makes no sense, it is argued, to presume that the agent communicates his or her fraud to the very person he or she is defrauding. As was stated by Vaughan Williams J in In Re Hampshire Land Company, common sense at once leads one to the conclusion that it would be impossible to infer that the duty, either of giving or receiving notice, will be fulfilled where the common agent is himself guilty of fraud. Saville LJ pointed out that an assumption of communication in these circumstances 'offends common sense'. More recently, in *Bilta (UK) Ltd (inliquidation) and ors v Nazir and ors (No 2)* the Justices of the Supreme Court expressed competing views on the justification of the fraud exception. Lord Sumption characterized it as a rule of public policy, Lords Neuberger and Mance considered that the question whether to attribute knowledge depended 'on the nature and factual context of the claim in question.

[71] It bears noting that the Court of Appeal in the present case relied entirely on *Doshi v Yeoh Tiong Lay* to conclude that one cannot impute knowledge of fraud of a solicitor as being knowledge of the client. This is what the Court of Appeal said:

> Further, case law has established that one cannot impute knowledge of fraud of a solicitor as being knowledge of the client. Although the general rule is that the knowledge of a solicitor is that of the client, such that it is not open to the client to say that the solicitor did not disclose the true facts to him, an important exception to the general rule, is in cases of fraud. As such even if the defendant's security documentation lawyer can be said to have had some knowledge of the allegation of fraud, such knowledge cannot be imputed to the defendant.

[72] The Court of Appeal held that the solicitor's knowledge of the fraud allegation could not be imputed to the defendant. That being the case, the underlying basis for the Court of Appeal in the present case to justify appellate intervention was wholly misconceived and untenable. As we have explained, the exception is only admitted where the solicitor is complicit in the fraud, which is not the case in our present case. Where the solicitor was not complicit in the fraud but had knowledge of the same, this knowledge must be imputed to the defendant. Had the Court of Appeal applied the correct principle in the context of the present case it would have concluded that the solicitor's knowledge could be imputed to the defendant. The grave fundamental error made by the Court of Appeal in the present case was its failure to apply the

general principle that the solicitor's knowledge could be imputed to the defendant. It was an erroneous approach that resulted in miscarriage of justice. This, in itself is sufficient to warrant appellate interference on our part.

[73] Therefore, on the facts of the case, the knowledge of the solicitor was the knowledge of the defendant. The defendant was bound by the solicitor's knowledge. The defendant granted the loan and proceeded to register the charge, knowing through the solicitor that there was a serious dispute as to the ownership of the land and that there was serious allegation that Nagarajan obtained title to the land by fraud. On this issue we conclude by saying that the defendant could not say that it was not aware of the dispute and the fraud allegation. But the matter did not end there though.

[74] There is another crucial issue that we need to address. The more difficult question taken by learned counsel for the defendant was whether the solicitor's knowledge acquired in a previous or different transaction could be imputed to the defendant.

IMPUTED KNOWLEDGE ACQUIRED BY SOLICITOR IN A PREVIOUS OR DIFFERENT TRANSACTION

[75] Before us, the main thrust of the contention of learned counsel is that notwithstanding the general principle that the knowledge of an agent was imputed to its principal in the same transaction, such imputation was qualified and limited to the transaction in which the knowledge was obtained. He argued that on the facts herein, there were separate and subsequent transactions ie, the transfer of the land from the deceased to Nagarajan and thereafter, the registration of the defendant's charge; however, a common solicitor was involved in both the separate transactions. In the conveyance of the land, the solicitor was acting on the instruction of his principal, Nagarajan, and within the scope of his employment to the same. The solicitor subsequently acted for the defendant as its loan and security documentation lawyer in respect of Nagarajan's loan. The solicitor also acted for the defendant in the registration of the charge. Learned counsel argued that the transfer of the land and the registration of the charge were separate and subsequent transactions, as they shared different principals. The former transaction, being Nagarajan, whilst the latter transaction, being the defendant. Therefore, according to learned counsel, that knowledge of a common solicitor could not be imputed to a subsequent principal in a separate transaction.

[76] In support of his contention, learned counsel had drawn our attention to the English Court of Appeal case of *Halifax Mortgage Services Ltd v Stepsky and another* [1996] Ch 207, *Saffron Walden Second Benefit Building Society v Rayner* (1880) 14 Ch D 406 and *O'Keefe v London and Edinburgh Insurance Co*

Ltd [1928] NI 85.

[77] Based on these authorities learned counsel submitted that when the solicitor acted for Nagarajan in the transfer of the land and thereafter for the defendant in the preparation of the loan and security documents for the loan, it consisted of two separate and subsequent transactions in which the principal for the transfer was Nagarajan. The solicitor was not an agent for Nagarajan and for the defendant, concurrently in the same transaction. Thus, it was submitted that the knowledge acquired by the solicitor as regards to the allegations of fraud pertaining to the transfer of the land, such knowledge so acquired could only be imputed to the principal of the transfer transaction, ie Nagarajan, and not to the defendant; the solicitor was not acting for the defendant at the material time. Learned counsel submitted that the solicitor could not bind prior knowledge, ie the allegations of fraud of the transfer of the land, to its subsequent principal, the defendant, and thus the defendant in all events, was a purchaser in good faith and for valuable consideration within the meaning of proviso to s 340(3) of the NLC and was further not affixed with notice of fraudulent allegations.

[78] Having carefully considered these and other arguments we are unconvinced by the defendant's contention. Our reasons now follow. In the first place the facts of the cases cited by learned counsel for the defendant are distinguishable from the facts of the instant appeal. In *Halifax Mortgage Services Ltd v Stepsky and Another*, the husband and his wife applied to the mortgagee for a loan. They informed the mortgagee that the loan was for their joint benefit, ie for the purchase of shares in the family business. The husband, however, informed the common solicitor of both mortgagors and mortgagees that the true purpose of the loan was for his sole benefit, ie for paying off the first mortgage and settling his business debts. After obtaining the loan they fell into default. The mortgagees, obtained an order for possession but the wife contended, that the mortgage should be set aside as the knowledge of the solicitor had to be imputed to the mortgagees. On the facts it was held that a solicitor for both a borrower and a lender in the same transaction, and obtained from the borrower knowledge of some fact which it was his duty to the borrower not to disclose to the lender without the borrower's consent, knowledge of that fact was not to be imputed to the lender. *Saffron Walden Second Benefit Building Society v Rayner* is an authority to the effect that if solicitors for a party lacked authority to receive notices, purported service upon them was ineffective to amount to service on the party. In this case notice of an encumbrance was given to a solicitor who had been employed by trustees in all matters relating to the trust in which professional assistance was required, but who had not been authorised to receive notices on their behalf, and the solicitor wrote formally acknowledging receipt on behalf of the trustees. It was held that the notice to the solicitor did not operate as notice to the trustees, solicitors not

being, as such, standing agents of their clients to receive notices on their behalf. *O'Keefe v London and Edinburgh Insurance Co Ltd* is a case in respect of unconnected transactions in which the court observed, 'The danger of making the agent's memory of bygone transactions a jury question is obvious, and recollection or forgetfulness by the agent of matters known to him previous to that relation is not allowed to affect the liability of the principal except in certain well-recognised cases'.

[79] The authors of *Bowstead & Reynolds On Agency* at p 540 summarised four rules on imputation:

(i) the law may impute to a principal knowledge relating to the subject matter of the agency which the agent acquires while acting within the scope of his authority;

(ii) where an agent is authorised to enter into a transaction in which his own knowledge is material, knowledge which he acquired outside the scope of his authority may also be imputed to the principal;

(iii) where the principal has a duty to investigate and make disclosure, he may have imputed to him not only facts which he knows but also material facts of which he might expect to have been told by his agents; and

(iv) knowledge is not attributed to the principal where the principal is claiming in respect of a breach of duty of his own agent, and, perhaps, where the agent is defrauding the principal in the transaction at issue.

[80] In our opinion, rule (ii) is a situation in which an agent's knowledge obtained in a different transaction or before his employment as agent can be imputed to his or her principal. In this context, Hoffmann LJ in *El Ajou v Dollar Land Holdings plc and another* [1994] 2 All ER 685 explained that there were cases in which an agent was authorised to enter into a transaction in which his own knowledge was material. At p 546 the authors of *Bowstead & Reynolds On Agency* said: 'And it can be expected that courts will be resistant to arguments that two connected transactions were nonetheless discrete for the purposes of the rules of imputation'.

[81] The application of this rule can be seen in *Le Neve v Le Neve* (1747) 1 Ves Sen 64, where Lord Hardwicke imputed the attorney's knowledge acquired previously and another transaction to the defendant. In *Hargreaves v Rothwell* (1836) 1 Keen 154, Lord Langdale MR said:

> Where one transaction was closely followed by, and connected with another; or where it was clear, as in the case before the Court, that a previous transaction was present to the mind of the solicitor when engaged in another transaction, there was

no ground for the distinction by which the rule, that notice to the solicitor is notice to the client, had been restricted to the same transaction.

[82] In his judgment, Lord Langdale suggested that if two matters for separate principals took place so close to one another that the first matter must have been still present in the agent's mind, imputation could occur. Lord Langdale explained this by referring to the case of *Mountford v Scott* as follows:

> In the marginal note to the case of *Mountford v Scott*, it is said that notice to an agent, in order to bind his principal, must be in the same transaction; and this though the agent acted as attorney for the vendor and vendee. The judgment itself certainly does not [160] lay down the proposition so absolutely as it is stated in the marginal note; but the case came upon appeal before Lord Eldon, and is reported in *Turner v Russel* (page 274), where it appears that Lord Eldon's judgment turned upon a point entirely different, which rendered the question of notice wholly immaterial. The point upon which Lord Eldon decided the case was that, where deeds are deposited for the particular purpose of obtaining credit, the person with whom the deeds are deposited has no lien upon them for what is due to him in respect of monies previously advanced. But Lord Eldon notices the ground of the Vice-Chancellor's decision, and the observations he makes on the subject of notice are extremely important. The 'Vice-Chancellor', he observes, 'in this case appears to have proceeded upon the notion, that notice to a man in one transaction is not to be taken as notice to him in another transaction; in that view of the case it might fall to be considered, whether one transaction might not follow so close upon the other as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as tosay that, if an attorney has notice of a transaction in the morning, he shall be held, in a Court of Equity, to have forgotten it in the evening; it must in all cases depend upon the circumstances'.
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> In these observations I entirely concur.

[83] In *Rolland v Hart* (1871) LR 6 Ch App 678, which was cited by *Doshi v Yeoh Tiong Lay*, a solicitor induced a client to advance money for a borrower on mortgage of lands in Middlesex, and soon afterwards induced a second client to advance money on mortgage of the same lands without informing him of the existence of the first mortgage. The solicitor afterwards left the country, and the holder of the second mortgage registered it before the first mortgage was registered. In holding that the holder the second mortgage must be taken to have had, through the solicitor, notice of the first mortgage, and could not by the prior registration obtain priority, Lord Hatherley LC explained:

> Then the only question is, what is actual notice? It has been held over and over again that notice to a solicitor of a transaction, and about a matter as to which it is part of his duty to inform himself, is actual notice to the client. Mankind would not be safe if it were held that, under such circumstances, a man has not notice of that which his agent has actual notice of. The purchaser of an estate has, in ordinary cases, no

> personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance because he was not told of it by his solicitor.
>
> It cannot be left to the possibility or the impossibility of the man who seeks to affect you with notice being able to prove that your solicitor did his duty in communicating to you that which, according to the terms of your employment of him, was the very thing which you employed him to ascertain.
>
> I think it is clear, upon the authorities, that as there was, in this case, plain and distinct notice on the part of the solicitor employed by Mr Stagg of the previous security, that notice must, therefore, imputed to Mr Stagg.

[84] In *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, it was noted at p 649 that where a client authorised his solicitor to carry out a conveyancing transaction on his behalf, he 'thereby not only authorises his solicitor to perform all necessary steps but also places the solicitor in the position of acquiring at first hand knowledge of relevant facts, at the same time depriving himself of the opportunity of acquiring such first hand knowledge'.

[85] The authorities show clearly that there could be situations where an agent's own knowledge, which is acquired by the agent in a previous transaction or before his employment as agent may be imputed to the principal. That being the principle to be applied, we now turn to the present case.

[86] For what purpose was the solicitor appointed as agent of the defendant? It was his duty to prepare loan documentation and inquire about the title. The defendant for the purpose of facilitating the said conveyancing transaction appointed the solicitor. He prepared and settled documents. He was duty bound to report back to the defendant on any encumbrances that he was aware of in respect of the transaction. It is particularly important to stress that the solicitor had a duty to investigate and communicate the results to the defendant (see *Chin Hein Chong v Tey Sin Sze & Anor* [2016] MLJU 1156; [2017] 4 CLJ 348 and *Law Society of Singapore v Udeh Kumar s/o Sethuraju* [2013] 3 SLR 875). It is to be observed that the solicitor exercised a certain degree of authority over the transactions. The defendant relied on the opinion and skill of the solicitor. It was the solicitor's duty as agent of the defendant to obtain indefeasibility of interest for the charged land. The solicitor's knowledge of facts was acquired in a transaction on the same piece of land. The two connected transactions were separated from each other by a period of about three months. By a letter dated 25 July 2006, Messrs Ramesh Vasan & Co acting for the deceased wrote to the solicitor indicating that there was a dispute as to the ownership of the land. What is more glaring is that at the material time, the solicitor was actively involved in the dispute between the deceased and Nagarajan. By a letter dated 18 October 2006, the defendant granted the loan to Nagarajan. The solicitor must have been engaged by the defendant to

prepare the security documents for the loan earlier than 18 October 2006. The more closely we look at the facts, the more apparent it became that the two transactions were immediately consequent on one another, and were very closely connected that the first must obviously have been still present in the solicitor's mind. The conclusion was inescapable. The solicitor could not claim to have forgotten the information in question. In the context of the present case, how the solicitor acquired the knowledge was irrelevant because it was material to the solicitor's duty to the defendant. In our opinion, under these circumstances the knowledge of facts of the solicitor acquired in the earlier transaction must be imputed to the defendant in the course of acting for the defendant in the conveyancing transaction, although the defendant was not interested in the earlier transaction. It matters not the solicitor was unwilling to reveal his knowledge of the facts to the defendant. As Megarry J said in in *Spector v Ageda* [1973] Ch 30: A solicitor must put at his client's disposal not only his skill but also his knowledge, so far as is relevant; and if he is unwilling to reveal his knowledge to his client, he should not act for him.

[87] It is only through the auspices of the solicitor that the defendant could have acquired interest on the land that was now contested by the plaintiff; it would be wrong to allow the defendant to adopt the solicitor's actions whilst disowning the solicitor's knowledge of the dispute as to the ownership of the land and the allegation that Nagarajan obtained title to the land by fraud (see *Bowstead & Reynolds On Agency* at p 546). In the imputation context, a third party could not know whether key information which it was the solicitor's duty to communicate had in fact been passed by the solicitor to the defendant. For reasons of third party protection, such key information was deemed to have passed from the solicitor to the defendant (see *Agency Law in Commercial Practice* at p 207).

[88] Thus in the present case, the knowledge of the solicitor is regarded and treated by the law as the knowledge of the defendant. The defendant was therefore infected with the knowledge that there was a serious dispute as to the ownership of the land. What is more, the defendant knew of the allegation that Nagarajan obtained title to the land by fraud. This type of knowledge would affect the good faith of the defendant. In our opinion the status of holder of interest in good faith is lost by reason of the material knowledge.

[89] In light of the fraud allegation there was a real necessity to conduct further investigative work. The serious allegation was material enough to arouse suspicion and had a real capacity to affect the defendant's interest. In *El Ajou v Dollar Land Holdings Ltd* Hoffmann LJ explained the duty to investigate:

> ... there are cases in which the principal has a duty to investigate or to make disclosure. The duty to investigate may arise in many circumstances, ranging from

> an owner's duty to inquire about the vicious tendencies of his dog (*Baldwin v Casella* (1872) LR 7 Exch 325 at 326–327) to the duty of a purchaser of land to investigate the title. Or there may be something about a transaction by which the principal is 'put on inquiry'. If the principal employs an agent to discharge such a duty, the knowledge of the agent will he imputed to him. (There is an exception, the scope of which it is unnecessary to discuss, in cases in which the agent commits a fraud against the principal).

[90] In the face of the suspicious and uncertain circumstances under which the transaction was transacted, still the defendant proceeded to disburse the loan to Nagarajan and created the charge on the land without making further inquiries. Courts would be slow to assist chargee who failed to take ordinary precautions that ought to be undertaken before registering the charged land and as such are not entitled to the protection of the court. As observed by Fry J in *Kettlewell v Watson*, 'The Court will not allow a man to avail himself of a legal estate which he has recovered, or of the right which he may have under a registered conveyance, knew a fact which made it unconscionable for him to take the legal estate or to effect the registration'. On the facts of the present case, in our judgment, the element of 'carelessness and negligence' also negated good faith on the part of the defendant.

[91] By reasons thereof, the good faith of the defendant in the entire transaction was very lacking thereby defeating its statutory defence of being a purchaser in good faith under the proviso to s 340(3) of the NLC. As such, in the circumstances, the defendant could not be said to have acquired the interest on the land in good faith. The charge created in favour of the defendant was therefore defeasible.

ANSWERS TO LEAVE QUESTIONS

[92] In consequence and in view of the above, our answers to the legal issues posed are as follows. In the context of the issues arising in the present appeal as well as the facts of the case, the answer to question 1 is in the affirmative.

[93] Flowing from the above, our answer to question 2 is as follows. The general rule is that the knowledge of a solicitor is regarded by law as the knowledge of the client. An exception to the rule is only admitted where the solicitor is complicit in fraud.

CONCLUSION

[94] In all the above circumstances, we would therefore allow the appeal by the plaintiff with costs. In the result, the orders of the Court of Appeal are set aside and we hereby reinstate the order of the High Court though on different grounds.

A *Appeal allowed; Court of Appeal's decision set aside and decision of High Court reinstated on different grounds.*

Reported by Ashok Kumar

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